UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DEREK SINCERE BLACK WOLF CRYER

Plaintiff,

V.

KATHLEEN DENNEHY, MICHAEL THOMPSON, CAROL MICI, GREG McCANN, TINA RANNO, MAE ROBINSON, GREG POLADIAN, TOM LAVELLE, WILLIAM TAYLOR

Defendants,

CIVIL ACTION

NO. 1:05-cv-11289

"Ex Parte is Considered"

Plaintiff's opposition Motion to Dismiss
Defendants Motion to Dismiss

Plaintiff request this Honorable Court to Dismiss Defendants Motion to dismiss according to the facts set forth in Plaintiffs Memorandum of Law and Supporting Documents attached thereto pursuant to Local Rule 7.1 (B) (2).

Respectfully Submitted,

Derek Sincere Black Wolf Cryer, Pro Se

Derek Sincere Black Wolf Cryer, Pro Se
MCI Shirley Medium
P.O. Box 1218 - Harvard Road
Shirley, MA. 01464

DATE: November 30, 2006

CC: Christa Robin
File / 11-30-06

United States District Court
District of Massachusetts

Derek Steven Black Wolf Cryer, Pro Se

v.

Kathleen Dennehy, et al

Civil Action
NO: 1:05-cv-11289

Plaintiff's Facts, Memorandum of Law
And Supporting Documents in Opposition
To Defendants Motion to Dismiss

Pro se Plaintiff filed complaint under the Religious Freedom Restoration Act (R.F.R.A.) 42 U.S.C. § 2000bb and the American Indian Religious Freedom Act (A.I.R.F.A.) in which the Honorable Court Justice Lindsay Dismissed in His August 4, 2005 Memorandum and Order (see "Exh. 1" attached), and allowed Plaintiff's Claims to proceed under the Religious Land Use and Institutionalized Persons Act (R.L.U.I.P.A.) 42 U.S.C. § 2000cc. Further, the complaint was filed under the 1st and 14th Amendment Rights under the U.S. Constitution, under 42 U.S.C. §1983, 42 U.S.C. §1996, as well as under the Massachusetts State Laws and Constitution (see "Exh. 2", Complaint at preliminary statement attached).

"Finally, the Defendants assert that the Plaintiff did not exhaust His administrative remedies ~~because of failing~~ because of failing to submit an informal request to the "Religious Services Review Committee" (R.S.R.C.) before filing suit. In Defendants Motion to Dismiss (see attached "Exh. 3", Pg 6, last Para., 1st Sentence) its clear that the prison has a set Grievance Policy (103 CMR 491.00) and system which allows prisoners to file grievances and grievance appeals which is the main purpose of satisfying the Prison Litigation Reform Act, 42 § 1997e. The Defendants do not dispute or contend that the Plaintiff properly exhausted all His administrative remedies through the prisons grievance procedure. In Santos v. Hauck 242 F Supp 2d 257 (W.D.N.Y. 2003) the Court dismissed the complaint without prejudice because the Plaintiff, although He filed the initial grievance, He did not file an appeal to that denied grievance. In the present case the Plaintiff (Cryer) did file both grievances and grievance appeals. So instead of arguing that Plaintiff didn't exhaust the Administrative Grievance Procedure by not

either filing a grievance or filing a grievance appeal, the Defendants ask this Court to dismiss based on "a Separate Administrative revision procedure" that the Defendants "developed" in order Plaintiff didn't "exhaust Administrative Remedies". This second "Separate Administrative Review Procedure" as stated in [Exh. 3 last paragraph] is "In addition" to the Inmate Grievance Policy" and is known as the Religious Services Review Committee (R.S.R.C.). In Abney v. Nassau 231 F.Supp 2d 278, (E.D.N.Y. 2002) at 283 the Court states, ["In view of the fact that Nassau County has chosen to fashion its own grievance procedure (which it is free to do), it is disingenuous for the Defendants to argue that a single provision of a different procedure should be grafted on to the Nassau County Procedure when it suits the County's litigation position"]. The R.S.R.C. is not a Committee within the institution, nor does it conduct interviews with prisoners to hear the prisoners request. Again and furthermore, the Defendants, for the purposes of the Prison Litigation Reform Act (P.L.R.A.), 42 §1997e, rather than argue that Plaintiff didn't exhaust the set administrative grievance procedure, request of this Court to Substitute or Eliminate the set grievance procedure exhaustion required by the P.L.R.A. (see also Exh. 4, M.G.L.A. 127 § 38E & 38F attached) and replace it with a Second "Separate Administrative Review Procedure", the R.S.R.C.. It seems that the Defendants, like in "Abney" are using the R.S.R.C. (Defense) "to suit its litigation purpose". In Porter v. Nussle 122 S.Ct. 983 (2002) at 985, Justice Ginsburg delivered the opinion of the Court, ["this case concerns the obligation of prisoners who claim denial of their Federal rights while incarcerated to exhaust prison grievance procedures before seeking Judicial Relief"]. Also see Porter on page 985 [b] at 518, "The threshold inquiry at issue here is whether resort to a prison grievance process must precede resort to

a Court". It is clear to the Plaintiff that the [illegible] is meant for prisoners to exhaust prison grievance procedures where there are procedures set in place, and as the present case at hand the Plaintiff (Pro.) properly used the prisons grievance procedure for exhaustion. The Defendants also Cit. "Ridgett v. Correctional Medical Services, Civ. A. No. 11700-MEL (D. Mass. Oct 13, 2005 - Memorandum and Order allowing Defendants Motion to Dismiss)" in which is also attached hereto as **Exh. 5** Pages 1-5; within this Memorandum and Order the dismissal of Ridgett Complaint for failure to exhaust His Administrative Remedies is explained on pages 1 through 3; Here Ridgett made six (6) written requests regarding a Religious Diet in which he never utilized the Administrative Grievance Procedure by filing not even one (1) single prisoner or grievance appeal. Once again, and unlike Ridgett. The Plaintiff (Pro.) has utilized the Administrative Grievance Procedure and in fact has properly exhausted all of His claims. In Rashad v. Commissioner of Correction 446 Mass 463, 476 477 (2006) as stated on Pages 7 and 8 in Defendants Motion to Dismiss (as attached **Exh. 6**), the Court in the continued paragraph on page 8 from page 7 in the last sentence stated that "as applied to Rashad" The R.S.R.C. Handbook "is valid". First Plaintiff notes that His Complaint was filed in 2005 before the Rashad Court Decision in 2006 and should be held to Rashad. Secondly, at this time I must say that I, the Plaintiff am in the prisons segregation unit (for the past 4 months) where I do not have access to a law clerk and the areas law library is inadequate as I do not have the Rashad case in its entirety and I argue it based only on Exhibit 6; The Plaintiff withdraws from (1) points of which the Rashad Court stated in exhibit 6: 1). The Rashad Court in the second sentence states that the Handbook (R.S.R.C.) is "in addition"; 2). In the same sentence the

Court states that the Handbook (RSRC) was prepared and established "to serve as a Tool and Reference source for prison administrators and Inmates"; 3). In the third sentence the Court states the powers of the RSRC which upon a Religious Request by an Inmate will "Review the requests for Potential Security Concerns and make Recommendations to the Commissioner for a final determination"; 4). Lastly the Court goes on to say, "By developing the Handbook, the Commissioner not only provided guidelines for prison officials but also provided a mechanism for inmates to seek an exception...". Now, to clarify, the Handbook (RSRC) is clearly "in addition" to (Not a part of) the Prisons Inmate Grievance Procedure (see attached Exh. 3, last paragraph, "In addition"). Secondly, this developed Handbook (RSRC) only serves as a "Tool" and "Reference Source" (see attached Exh. 7, Page 5; extract from the RSRC Handbook March 2006). Third and in part, the only authority the RSRC has is to make Recommendations (see Exh. 6, Pgs 7 and 8 "Rashad Court") and (see attached Exh 8, Recommendation letter from RSRC to Commissioner Defendant Kennedy); the RSRC has no authority to "Approve" or "Deny" inmate requests within the prisons grievance policy and procedure which has sole authority to approve or deny prisoner requests for resolution. Nor does the RSRC have an Appeal Process for prisoners as does the Prisons Grievance Policy and Procedure (see attached Exh. 9, 103 CMR 491 - Inmate Grievance, at 491.07 to 491.12). Lastly in Exhibit 6 on page 8 the Rashad Court states one of the reasons why the Handbook (RSRC) was developed. ["For inmates to seek an exception"]; as in an exception to, not a requirement before, filing a grievance. At best, the RSRC is an informal procedure in which a prisoner has a choice to seek out only a Recommendation of the request as to filing a Formal Grievance. Furthermore the institutions

Grievance Policy clearly states, "while Inmates are encouraged to pursue informal measures prior to filing a grievance, they shall not be required to do so" (see Exh. 9, Page 3, at 491.07 Informal Resolution) (see also Shaheed Muhammad v. Dicks [illegible] F.Supp. 2d [illegible] (Mass 2000) at 95, FN(2)).

The Defendants request to dismiss all of Plaintiffs claims as written from 1 to 10 (see attached Exh. 10, Page 1, Defendants Motion to Dismiss), however, they don't challenge that Plaintiff failed to exhaust the proper Formal Administrative Grievance Procedure, in exhibit 9, to all the claims they request this Court to dismiss. Plaintiff states for the record that He has exhausted all such claims to meet the requirements of the PLRA, 42 § 1997e. As to Defendants dismissal request, in exhibit 10, Plaintiff exhausted His claims to number 1 and 2 (see original Complaint at 49 and 51), (see also attached Exh. "DD" and Exh. "EE"); Plaintiff exhausted His claims to number 3 (see original Complaint, at 39, 40, and 70), (see also attached Exh. "V" and Exh. "PP"); Plaintiff exhausted His claims to numbers 4, 5, 6, 7, 8, 9, and 10 (see original Complaint, at 58 and 60), (see also attached Exh. "II" and Exh. "JJ").* Defendants do not challenge Plaintiffs stated exhaustion, rather "admits" to Plaintiff exhausting the prison administrative Grievance Procedure on such claims (see attached Exh. 11, the "Defendants Answer to Complaint", at 49, 51, 39, 40, 70, 58 and 60).

For the reasons stated above Plaintiff request this Court to dismiss the Defendants Motion to dismiss.

*1). Note: See attached "Exh. GGG" which is the Grievance Appeal "decision by Superintendent" from "Exh. JJ" in original Complaint at paragraph #60. The Appeal Decision is dated May 21, 2[illegible].

Secondly, the Defendants request this court to dismiss Plaintiffs retaliation and harassment claims; Plaintiff opposes Defendants request. Acts taken against prisoner in retaliation for exercise of constitutional right can state claim under § 1983, even when retaliatory acts do not themselves violate constitutional right (see Thomas v. Hall 963 F.Supp. 13 (W.D.N.Y. 1997). Corrections officers may not maliciously interfere with inmates permissible religious practices or harass him because of such practices (see Jemmings v Kelly 739 F.Supp. 134 (W.D.N.Y. 1990). Using the language of 42 U.S.C.A. § 1983, "Inmate bringing § 1983 claim of retaliation for exercise of constitutional right must produce direct evidence of motivation or, the more probable scenario, allege chronology of events from which retaliation may plausibly be inferred." (see David v. Hall 401 F.Supp. 2d 14, (S.D.Tex 2005). To show retaliation claim Plaintiff must prove a chronology of facts from which retaliation can be inferred (see Colon v. Jane 847 F.2d 1158, 1167 N.2 (1st Cir. 1988). First, the Plaintiff has a 1st and 14th Amendment Constitutional Right to practice His native American "religion" (Spirituality Culture). His religious rights are also governed by the Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 U.S.C.A. § 2000cc. Plaintiff states that due to Plaintiff's charges He was threatened and Retaliated against by the Defendants on several occasions beginning in early February 2004 (see Original Complaint at paragraph 14, 15, 16, 17, 18, 19, 20, 21, 28, 32, 33, 34, 40, 41, 42, 43, 44, 61, 73, 74, 75 and 80), (see also attached Exh.'s A, B, C, D, E, F, G, H, N, P, V, W, X, Y, KK, RR, UU, and VV). To the Plaintiff it is clear that He was threatened and retaliated against. In support of Plaintiff claims, Plaintiff state that because of the Defendants actions against him (in Exh.'s A, B, C, D, E, F, G, H, K, V, and Y), formal investigations were conducted against

the defendants (see attached Exh's [illegible], V, [illegible], [illegible] and VV). Four of them were investigated by the Internal Affairs and one was investigated directly from the Department of Corrections (DOC) Commissioner's Office. From these investigations Plaintiff has just recently received the final outcome in which it [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] (see attached Exh. 12). In furtherance of retaliation and disregard of Plaintiff's choice of [illegible] [illegible] [illegible], Defendant McLaren, through Defendant Rice posted a March [illegible], 200[illegible] memorandum on the wall no more than one foot away from the Programs Building officer's desk which is titled "Native American [illegible]" (see attached Exh. [illegible]), the first sentence states "Due to different Staff being assigned to the Programs Building recently, there has been an issue with the Native American [illegible] Group". Defendant McLaren is referring to Defendants [illegible] and [illegible] as Defendant [illegible] was already there acting as [illegible] Disciplinary Officer in the building. Defendant McLaren continues in Exh. [illegible], "Please be advised that during approved times, and the schedule is posted in the Programs Building, Native American Inmates should be provided access to the Native American Room as well as the [illegible] [illegible]". There are, were two schedule postings, one taped to the outside of the closet door of the Native Indian Area, and the other one posted clearly in the window of the Native Indian Area; being opened from "9:00 am to 11:00 am" and "1:00 pm to closing" Sunday through Friday etc. Here McLaren emphasizes to Staff (Defendants) to abide by the schedule which was always posted. Finally Defendant McLaren makes it clear to Staff by stating in Exh. [illegible], "It is expected that staff are cognizant that this is a religious [illegible] [illegible]". This memo came out on March [illegible], 200[illegible], [illegible] [illegible] the next

10 and 11 [illegible] the Defendants Harassed and Retaliated against the Plaintiff (see exhibits [illegible], and [illegible]). Ultimately, and regardless of all that [illegible] of the investigation that is still pending, [illegible] Plaintiff's [illegible] and [illegible], Defendant Nelson, instead of working the issue with Staff, decided to [illegible] the [illegible] by closing down the Nation [illegible] [illegible] the [illegible] [illegible] the Plaintiff's right to practice his religion". [illegible] (Plaintiff [illegible]) [illegible] Defendants [illegible] "Plaintiff has the substantial burden of proving that "but for" retaliation he would not have been subjected to the [illegible]". Up until February [illegible], "due to [illegible] staff being assigned to the [illegible] Building", Plaintiff has [illegible] the Nation [illegible] worship area for two years faithfully on a daily basis in the mornings and afternoons without any trouble or incident. If it wasn't "but for" Defendants Robinson, [illegible] and Nelson, Plaintiff would not have filed these grievances and complaints and Defendant Nelson would have never closed the nation [illegible] area. Plaintiff believes that through the direct evidence above and in the chronology given above that it was [illegible] and retaliated. "Or plausibly to inferred" by the court (see [illegible] v. [illegible] [illegible] 749 (S.D. Texas 200[illegible]). In and throughout the last paragraph on "Page 10" of Defendants Motion to Dismiss (see attached Exh. 13), the Defendants attempt to mislead the Court; In the fourth sentence Defendants use the term "at his request", suggesting to the court that Plaintiff wanted the nation room and footlocker opened during unscheduled times. Plaintiff, through exhibit [illegible] and all other exhibits in this action, has already established his right and

approval of the administration to access the Native area and locker during the mornings and afternoons. In the fifth sentence of Exhibit 13, Defendants state that "the prison administration reduced hours of weekday access to religious programs in the Programs Building, including the Native American area and locker". Coincidentally, the "reducing" of the hours was implemented 14 days after I filed my last grievance against defendant Robinson (see Exh. 9) on February 14, 2005. In my March 22, 2005 grievance against the defendant Robinson (see attached Exh. DD), Plaintiff states that the native area was closed down during the day times on February 22, 2005; the time was not "Reduced" as suggested by Defendants; nor was the "reduced" weekday time targeted at any other Religious sect or Denomination other than the Native Indian area (see attached Exh. 14, Programs schedule). In the sixth sentence of Exhibit 13, Defendants try to mislead the Court into believing that Plaintiff requested "additional access" to the native area; Plaintiff only requested access to the native area and locker during approved times given from the administration. Surely if Plaintiff made a fuss over attaining unscheduled access to the Native area and locker, Plaintiff would have been immediately disciplined. In the seventh sentence of Exhibit 13 the defendants would like the Court to believe that the "actions" of defendants were mere "miscommunications"; then the defendants were clearly informed in early February 2004 (see exhibit 6, 2nd Paragraph), and the "miscommunications" of these stated defendants continued for a year until February 14, 2005 (see exhibit 8). Plaintiff also points to the fact that, in the same sentence, Defendants admit to their "behavior"

against Plaintiff (see exhibit 13, at [illegible]).

Plaintiff finally states that the Defendants, prior to their motion to Dismiss as well as presently have refused to properly participate in discovery with the Plaintiff (as required by Fed. R. Civ. P. 33, 34, and 37) by not responding to Plaintiff's "Production of Documents Request" and Plaintiff's "Interrogatories and Request for Production of Documents" thereby stalling Plaintiff to move onto the deposition aspect of discovery. However, Plaintiff sent a motion to compel Discovery on August 9, 2006 which was mailed to the court on August 21, 2006 (see attached **Exh. 15**, Motion to Compel Discovery). Plaintiff asserts that through the court compelling discovery from Defendants, Plaintiff will be able to produce additional evidence and proof to further validate the claims of Harassment and Retaliation. Although Plaintiff believes that he provided more than enough satisfactory evidence to the court to overcome Defendants motion to Dismiss, Plaintiff request the Court to Dismiss Defendants motion to Dismiss on the claims stated above according to the opposition stated above, or in the alternative, Plaintiff request the Court to set aside Defendants Motion to Dismiss and grant Plaintiff's motion to compel (Exh. 15) to allow Plaintiff the opportunity to bring all of the facts to the attention of the court in Defense of Plaintiff's claims and in accordance with Fed. R. Civ. P. 26, 33, 34, 37, and 56.

Plaintiff also request of the Court to allow Plaintiff opposition to defendants motion to dismiss conspiracy claims the opportunity to add all necessary evidence claimed by the Plaintiff by compelling the defendants to respond to Plaintiffs discovery request as stated in the previous section above (Fed R C P 30, 33, 34, 37, and 56). It can be inferred through the above evidence and chronology that a conspiracy in fact took place amongst these defendants. (See Defendants cite as well as Landrigan v. City of Warwick 628 F.2d 736 (1st Circuit 1980) stating "In a conspiracy claim under § 1983, a Plaintiff must allege and prove both a conspiracy and an actual deprivation of right". Plaintiff engaged in his 1st Amendment right for exercise of religion which was facilitated by the prison on March 26, 2004 (see Exh. UU) only for Plaintiff to be continually deprived access to the Native area, Sacred Objects, Artifacts and Ceremony for the next 10 and 11 months (see exhibits V and Y) which ultimately ended up in defendant Maloney closing the Native area all together only 4 days after Plaintiffs final grievance against defendant Robinson (see and compare Exh. Y to Exh. DD). The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) Section 3 in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution; unless the burden furthers "a compelling governmental interest" and does so by "the least restrictive means"; How defendant Maloney completely closed the Native Area during the daytime hours all together and has not offered no defense on record? With the Court ordering the Defendants to produce Discovery requested by the Plaintiff,

Plaintiff will be able to further prove that a conspiracy between these defendants did in fact take place and continues to take place. For these reasons Plaintiff request the court defendants to produce discovery requested by Plaintiff and to either [illegible] defendants' motion to dismiss on Plaintiff's conspiracy claims or in the alternative set aside Defendants' Motion on these claims until discovery is complete and Plaintiff has opportunity to oppose Defendants' Motion in accordance with Fed. R. Civ. P. 30, 33, 34, 37 & 36.

Finally, defendants request the Court to decline pendent jurisdiction over Plaintiff's state law claims in [illegible] federal claims [illegible] defendants have made this argument [illegible] the idea that the Court will find that Plaintiff did not exhaust the administrative remedies, and on no other ground. Plaintiff has exhausted the PLRA requirements and therefore request the Court to dismiss defendants motion to dismiss. Furthermore, the Court has discretionary authority to exercise supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. §1367 (see exhibit 1, Page 8, at III. <u>State Law Claims</u>). The Court also has original jurisdiction of any civil action arising from a deprivation of a right secured by the constitution (see 28 U.S.C. § 1343(A)(3)), also (28 U.S.C. §1331). When a constitutional claim is made under civil rights statute that is of "sufficient substance" to support federal jurisdiction, a District Court has power under jurisdictional [illegible] to [illegible] other claims based on civil rights statute without determining that latter claims standing alone are sufficient to support jurisdiction (see Dougherty v. Perry, 560 F.2d 160 C.A.3 (N.J.) 1977). Accordingly, Plaintiff request the Court to exercise its right of jurisdiction over Plaintiff's federal [illegible], 1st and 14th Amendment claims and state law claims, (see exhibit 1, Page 8, at III. <u>State Law Claims</u>), (also M.G.L.A. 127 § 88 - Religious Services, ["an inmate of any prison or other place of confinement <u>shall</u> not be denied <u>the free exercise of his</u> Religious belief [illegible]"], and request that Court to dismiss defendants motion to dismiss. In addition Plaintiff state that he is the victim of Religious and racial discrimination over which Federal Court can assert Jurisdiction through Plaintiff's 1st and 14th Amendments rights of the U.S. Constitution. "Native Americans" here at M.C.I. Shirley Medium prison, and throughout

the Department of Corrections (D.O.C.) have for years been Discriminated against by having our Spiritual Sacred Regalia Confiscated (see Tierney v. DuBois U.S.D.C. Civil action No. [illegible] 1996 U.S. Dist. LEXIS [illegible] (D. Mass. [illegible], 1996) and or through the denied access of Ceremony Structures (see Trapp v. DuBois 17 Mass. L. Rptr. 575, 2004 WL 35660? (Mass. Super. [illegible])) or Sacred Ceremonial Herbs (see Exh. 8)[1] or being restricted and prohibited from practicing our Religion-Spirituality during the daytime hours (see Exh. [illegible]). Further, to add insult to injury, Defendants who allow "European Indians" to construct a Council have denied the Plaintiff to practice Black Indian Spirituality (see Exh. III, attached); which in turn denies an entire people's existence all together. For the purposes of Pendent jurisdiction Plaintiff also cites, Com. of PA v. B[illegible], E.D. Pa. 1966, 260 F. Supp. 323, [where first count of complaint in action for injunction to prohibit defendants' continued refusal to admit minor plaintiffs and other applicants to charitable school merely because they were negroes raised substantial federal question, and the federal court had jurisdiction of first count, and second and third counts, which raised state claims, along with first count constituted a single case for a single trial, district court had pendent jurisdiction of second and third counts]. Plaintiff request the court have full Jurisdiction over all of Plaintiffs claims.

[1] In exhibit 8 there are twenty six (26) religious requests; twenty (20) of them are from Native Indian Practitioners; three (3) of the twenty are neither approved or denied while the remaining seventeen (17) have been marked as being denied. One of which is Black Indian spirituality.

Conclusion

Plaintiff request that due to the above foregoing facts that the court [illegible] to produce discovery requested by plaintiff.

Respectfully submitted,

Derek Simmons Black Wolf Cooper, Pro Se

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P.O. Box 1218 Harvard Road
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Dated: November 30, 2006

CC: [illegible]
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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